

EXHIBIT 1

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA**

In re: Equifax Inc. Customer Data
Security Breach Litigation

MDL No. 17-2800-TWT

CONSUMER ACTIONS

THEODORE H. FRANK and
DAVID R. WATKINS,

Chief Judge Thomas W. Thrash, Jr.

Objectors.

DECLARATION OF MELISSA A. HOLYOAK

I, Melissa A. Holyoak, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. I represent class members David R. Watkins and Ted Frank in this matter.

3. Attached as Exhibit A is a true and correct copy of Consumer Plaintiffs' Motion for Appeal Bond filed in *In re: The Home Depot, Inc., Customer Data Security Breach Litigation* No. 1:14-md-02583-TWT, Dkt. 292 (N.D. Ga. Sept. 29, 2016), that I downloaded from PACER.

4. Attached as Exhibit B is a true and correct copy of the Declaration of Roy E. Barnes filed in *In re: The Home Depot, Inc., Customer Data Security Breach Litigation*, No. 1:14-md-02583-TWT, Dkt. 292-4 (N.D. Ga. Sept. 29, 2016), that I downloaded from PACER.

5. Attached as Exhibit C is a true and correct copy of Minute Entry for proceedings held before Judge Thomas W. Thrash, Jr: Motion Hearing held on 10/21/2016 GRANTING in part and DENYING in part 292 Motion for Bond Pending Appeal filed in *In re: The Home Depot, Inc., Customer Data Security Breach Litigation*, No. 1:14-md-02583-TWT, Dkt. 315 (N.D. Ga. Oct. 21, 2016), that I downloaded from PACER.

6. Attached as Exhibit D is a true and correct copy of the Transcript of Hearing held October 21, 2016 before Judge Thomas W. Thrash, Jr. filed in *In re: The Home Depot, Inc., Customer Data Security Breach Litigation*, No.

1:14-md-02583-TWT, Dkt. 318 (N.D. Ga. Oct. 26, 2016), that I downloaded from PACER.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 13, 2020, in Salt Lake City, Utah.

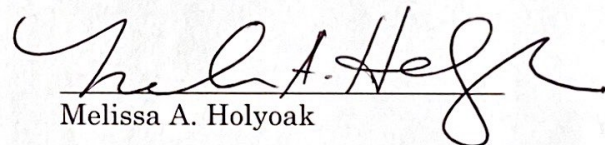

Melissa A. Holyoak

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Case No.: 1:14-md-02583-TWT

In re: The Home Depot, Inc., Customer

Data Security Breach Litigation

This Document Relates to:
CONSUMER CASES

CONSUMER PLAINTIFFS' MOTION FOR APPEAL BOND

COME NOW Consumer Plaintiffs and file this Motion for Appeal Bond and respectfully request this Court issue an order requiring Objector/Appellant Sam A. Miorelli to post a bond in the total amount of \$40,217.00, including \$1,100.00 in direct appeal costs and \$39,117.00 for a portion of the increased administrative costs the Claims Administrator will incur during objector's appeal. In addition to this Memorandum of Law Plaintiffs submit the Declaration of John Yanchunis, the Declaration of Roy Barnes Regarding Direct Appeal Costs During the Appeal Process, and the Declaration of Kenneth Jue Regarding Settlement Administration Costs During the Appeal Process, all filed contemporaneously. As shown in the memorandum, the requested appeal bond is authorized by Federal Rule of Appellate Procedure 7 and is appropriate under the facts. A proposed Order is attached.

WHEREFORE, Consumer Plaintiffs respectfully request that this Court order Objector Sam Miorelli to:

1. File a bond in the amount of \$40,217.00, or deposit into the Court registry cash in the amount of \$40,217.00; and
2. File with the Clerk of Court and serve on Consumer Plaintiffs' Lead Counsel proof of satisfaction of the bond requirement within 10 days of the Court's order.

Respectfully submitted this 29th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the above and foregoing CONSUMER PLAINTIFFS' MOTION FOR APPEAL BOND on all parties by causing a true and correct copy to be filed with the court's electronic filing system, which should automatically send a copy to all counsel of record, and also via overnight and electronic mail to the following:

Objector Sam Miorelli
764 Ellwood Avenue
Orlando, FL 32804
sam.miorelli@gmail.com

Dated: September 29, 2016

/s/ David J. Worley
David J. Worley

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re: The Home Depot, Inc., Customer
Data Security Breach Litigation

Case No.: 1:14-md-02583-TWT

“CONSUMER CASES”

**DECLARATION OF ROY E. BARNES REGARDING DIRECT APPEAL
COSTS DURING THE APPEAL PROCESS**

I, ROY E. BARNES, declare:

1. I am an attorney licensed to practice before the courts of Georgia. I have the privilege of serving as the Court-appointed Consumer Liaison Counsel on behalf of Plaintiffs in the Consumer Cases in this litigation. I am a partner in the Barnes Law Group, LLC. I submit this Declaration in support of Consumer Plaintiffs’ Motion for Appeal Bond. I have knowledge of the facts presented in this Declaration.

2. On September 22, 2016, Objector Sam Miorelli filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit from this Court’s Order Granting Final Approval of Class Action Settlement and Final Judgment filed August 23, 2016 (ECF No. 260), Order Granting Consumer Plaintiffs’ Motion for Service Awards, Attorneys’ Fees and Litigation Expense Reimbursement filed August 23, 2016 (ECF No. 261), and Judgment filed August

24, 2016 (ECF No. 262).

3. Consumer Plaintiffs' estimated direct costs on appeal for copying and binding Plaintiffs/Appellees' brief and appendix, and for copies of the court reporter's transcripts of the preliminary approval hearing conducted March 8, 2016 and the final fairness hearing conducted on August 12, 2016, will total at least \$1,100.00 for this appeal.

4. The administrative costs that will be reasonably incurred by the Claims Administrator as a result of the appeals are set forth in the Declaration of Kenneth Jue Regarding Settlement Administration Costs During the Appeal Process.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 29th day of September, 2016, in Atlanta, Georgia.

/s/ Roy E. Barnes
Roy E. Barnes
Ga. Bar No: 039000

EXHIBIT C

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

1:14-md-02583-TWT

**In Re: The Home Depot, Inc., Customer Data Security Breach Litigation
Honorable Thomas W. Thrash, Jr.**

Minute Sheet for proceedings held In Open Court on 10/21/2016.

TIME COURT COMMENCED: 2:07 P.M.

TIME COURT CONCLUDED: 3:08 P.M.

TIME IN COURT: 1:01

OFFICE LOCATION: Atlanta

COURT REPORTER: Susan Baker

DEPUTY CLERK: Sheila Sewell

ATTORNEY(S) David Worley, Norman Siegel, Cam Tribble representing plaintiffs
PRESENT: Phyllis Sumner Steward Haskins representing Home Depot
Sam Miorelli, pro se objector

PROCEEDING CATEGORY: Motion Hearing(Other Evidentiary Hearing-Contested);
MOTIONS RULED [292]MOTION for Appeal under 1292(b) GRANTED IN PART &
ON: DENIED IN PART

MINUTE TEXT: The Court heard argument on plaintiffs' Motion which was granted in part and denied in part for reasons stated on the record. Mr. Miorelli shall file a cash or approved corporate appeal bond in the amount of \$1,100.00 within 10 days. Mr. Worley to prepare order for the Court's signature. Mr. Miorelli called to testify regarding his financial declaration. The Court ordered Mr. Miorelli to provided to plaintiffs' counsel the two most recent quarterly reports from both his ROTH 401K and IRA accounts within 10 days and to file his supplemental declaration UNDER SEAL.

HEARING STATUS: Hearing Concluded

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)
)
THE HOME DEPOT, INC., CUSTOMER)
DATA SECURITY BREACH LITIGATION,) Case No. 1:14-MD-2583-TWT
)
) October 21, 2016
) 2:05 p.m.
_____) Atlanta, Georgia

TRANSCRIPT OF THE MOTIONS HEARING
BEFORE THE HONORABLE THOMAS W. THRASH, JR.,
U.S. DISTRICT COURT JUDGE

(Requested Portions Redacted)

APPEARANCES OF COUNSEL:

On behalf of the Plaintiffs: Patrick Barthle, II
Norman Siegel
Cameron Tribble
David Worley
John Yanchunis

On behalf of the Defendant: Donald Houser
Andrew Pratt
Phyllis Sumner

Also Present: Sam Miorelli

Proceedings recorded by mechanical stenography
and computer-aided transcript produced by

SUSAN C. BAKER, RMR, CRR
2194 U.S. COURTHOUSE
75 SPRING STREET, S.W.
ATLANTA, GA 30303
(404) 215-1558

1 (Proceedings held in Atlanta, Georgia, October 21,
2 2016, 2:05 p.m., in open court.)

3 THE COURT: All right. This is the case of In Re:
4 Home Depot Customer Data Security Breach Litigation, Case
5 Number 14-MD-2583.

6 First let me ask counsel for the parties to identify
7 yourselves for the record and the parties you represent
8 beginning with the Plaintiffs.

9 MR. WORLEY: David Worley of Evangelista Worley for
10 the consumer Plaintiffs.

11 THE COURT: Good afternoon, Mr. Worley.

12 MR. WORLEY: Good afternoon.

13 MR. SIEGEL: Good afternoon, Your Honor. Norman
14 Siegel, Stueve Siegel Hanson, co-lead for the Plaintiffs.

15 THE COURT: Good afternoon, Mr. Siegel.

16 MR. SIEGEL: Good afternoon.

17 MR. YANCHUNIS: Good afternoon, Judge. John
18 Yanchunis of Morgan & Morgan Complex Litigation Group, co-lead.
19 I'm here with an associate of mine, Patrick Barthle.

20 THE COURT: Good afternoon, gentlemen.

21 MR. TRIBBLE: Afternoon, Your Honor. Cameron Tribble
22 for The Barnes Law Group for the consumer Plaintiffs.

23 THE COURT: Good afternoon, Mr. Tribble.

24 MS. SUMNER: Good afternoon, Your Honor. Phyllis
25 Sumner, Stewart Haskins, Andrew Pratt, King & Spalding, on

1 behalf of Home Depot.

2 THE COURT: Good afternoon, counsel.

3 Is Mr. Miorelli here?

4 MR. MIORELLI: Good afternoon, Your Honor. I'm Sam
5 Miorelli.

6 THE COURT: Good afternoon, Mr. Miorelli.

7 All right. This is a hearing on the consumer
8 Plaintiffs' motion for an appeal bond which is our Docket
9 Number 292.

10 Who's going to speak for the Plaintiffs on this,
11 Mr. Worley?

12 MR. WORLEY: I am, Your Honor.

13 THE COURT: How much time do you think you need,
14 Mr. Worley?

15 MR. WORLEY: Well, that depends, Your Honor. Before
16 we proceed with argument, we would like to call Mr. Miorelli.
17 He has presented a declaration to the Court indicating that he
18 does not have the financial ability to pay a bond, and we
19 believe that there's some items in his declaration that under
20 questioning might lead one to conclude that he does have the
21 financial ability to post the bond. And we wanted to examine
22 him about that. I don't expect that that would take very long.

23 THE COURT: What do you say, Mr. Miorelli?

24 MR. MIORELLI: Well, Your Honor, this is essentially
25 an investigation by surprise. But I stand by my declaration.

1 I don't think there's anything uncertain in the declaration, as
2 long as the Court is willing to hear any objection I might have
3 to a question. And, obviously, I would expect that the motion
4 to seal that I had placed on my declaration I would ask that
5 that would apply to any testimony I might give in this as well.
6 Obviously, this is extremely private financial information
7 which is not of any information to the public.

8 I would say, Your Honor, though, that if the Court
9 looks at my response to the motion my response is entirely
10 arguing a legal propriety of the items that they have asked to
11 have taxed in the appeal bond, so to the extent that I think
12 that's the issue in question here and not who I am or any of
13 the other ad hominem attacks that have been launched at me in
14 this case.

15 THE COURT: All right. I think the first thing we
16 have to do, Mr. Worley, is to decide what the appropriate legal
17 standard is as far as awarding -- as far as setting an appeal
18 bond for matters other than the actual costs of the appeal. So
19 I am going to hear you on that first and then Mr. Miorelli.
20 And then if we need to get into the question of his financial
21 ability, I'll let you call him and examine him. But I want to
22 hear the legal argument first.

23 How long you think you need for that?

24 MR. WORLEY: I wouldn't think it would be more than
25 20 minutes, Your Honor, if that.

1 THE COURT: How about 15?

2 MR. WORLEY: I think I can confine myself to that,
3 Your Honor.

4 THE COURT: Ms. Sumner, how much time do you think
5 you need?

6 MS. SUMNER: Your Honor, Mr. Haskins will be
7 addressing that issue.

8 MR. HASKINS: We would just be very brief, Your
9 Honor, only a couple of minutes from us.

10 THE COURT: All right. Mr. Miorelli, how much time
11 do you think you need?

12 MR. MIORELLI: Your Honor, I would ask for at least
13 as much time as the combined parties up against me; although I
14 am not sure I would need all of that.

15 THE COURT: All right. I will give you 15 minutes,
16 Mr. Miorelli.

17 MR. MIORELLI: Thank you.

18 THE COURT: Mr. Worley?

19 MR. WORLEY: Thank you, Your Honor.

20 The issue here is, as the Court indicated, what is
21 the legal standard for requiring a bond from an appellant. And
22 Rule 7 is in some ways clear. An appellant can be required to
23 provide a bond to ensure payment of costs on appeal. The
24 purpose of Rule 7 is to protect appellees like the Plaintiff in
25 this case against the risk of nonpayment by an unsuccessful

1 appellant. Because the appeal in this case stays the entry of
2 a final judgment, stays the claims process and stops payments
3 to class members, it's a very important issue to the class.

4 The factors that courts use in deciding whether to
5 require an appellant to post a bond are five. Mr. Miorelli in
6 his brief has described these as multifactor mumbo jumbo. They
7 are not mumbo jumbo. They are the standards that district
8 courts have applied across the country to determine if a bond
9 is necessary.

10 The first is the financial ability to pay -- of the
11 appellant to pay. We believe that Mr. Miorelli may very well
12 have the ability to pay despite his declaration. But if we
13 could focus on the other issues, even if he did not have an
14 ability to pay, all of the other factors that courts look at
15 strongly favor granting a bond.

16 First, there are the merits of the case, the merits
17 of the appeal. Frankly, there are no merits to Mr. Miorelli's
18 appeal. The Court was very clear in its determination in
19 overruling his objection to the settlement. In order to
20 prevail, he has got to show an abuse of discretion by this
21 Court in finding that the settlement was fair, reasonable and
22 adequate and in awarding the amount of attorneys' fees that the
23 Court determined was appropriate. He cannot do that. So that
24 factor militates strongly in favor of granting a bond.

25 Another factor is the appellant's bad faith or

1 vexatious conduct. I don't want to go through in my 15 minutes
2 all of the various ways in which Mr. Miorelli avoided a
3 deposition in this case even though the Court had left open the
4 period of time in which a deposition could be taken.

5 Mr. Yanchunis's declaration is before the Court; and it makes
6 very clear that Mr. Miorelli engaged in bad faith and vexatious
7 conduct, particularly because he insisted on being served with
8 a subpoena when by that point in the case he was a party and
9 only required a notice, notice which he was provided initially
10 50 days before the date that was eventually set for his
11 deposition.

12 Another factor is the appellant attorney's prior
13 actions which in this case mean Mr. Miorelli's history as a
14 professional objector which is evident to the Court, and the
15 Court indicated that he was likely to be a professional
16 objector when it ruled earlier.

17 Finally, the last factor is the risk of nonpayment
18 when an appeal is unsuccessful. Mr. Miorelli claims that he
19 has no financial ability to post a bond. What that means is
20 that he -- consequently is that the risk of nonpayment is a
21 hundred percent. Now, there's obviously some tension between
22 those two factors. But financial ability under the test used
23 cannot be the sole factor, the only factor. The Court should
24 weigh these other factors, all of which weigh strongly in favor
25 of granting a bond.

1 Now, we have presented declarations to the Court
2 about the administrative costs that are going to be required
3 because of the appeal. And there's no dispute over those, and
4 we have been extremely conservative in asking for a bond of
5 roughly \$39,000 for those administrative costs. That's roughly
6 \$5,908 a month in the increased administrative costs for a
7 period of six months which, of course, is an extremely
8 conservative estimate because an appeal is likely in the
9 Eleventh Circuit to take much longer. And we pointed out in
10 our briefing objections to class-action settlements and the
11 time frames that it takes to deal with them, all of which are
12 far in excess of six months; but that's the period that we
13 conservatively have requested.

14 Now, Mr. Miorelli only raises two issues essentially
15 in his response to our motion. The first is his contention
16 that administrative costs are not recoverable in the absence of
17 statutory or rule authority because Rule 7 doesn't say --
18 Appellate Rule 7 doesn't say anything other than costs on
19 appeal.

20 He has presented the Court sort of generally with a
21 number of circuit court cases. We only need to focus on two
22 today. The first is the *Cardizem* case from the Sixth Circuit.
23 The other is the *Pedraza* case from the Eleventh Circuit.

24 THE COURT: Well, I'd suggest -- I'm not trying to
25 tell you how to do your job; but I'd concentrate if I was you,

1 Mr. Worley, on *Pedraza*.

2 MR. WORLEY: Well, I will. But I did want to talk
3 about *Cardizem* briefly because it relies on *Pedraza*, it cites
4 *Pedraza*, and it essentially follows *Pedraza* in large measure;
5 and it's actually more on point to the case here than *Pedraza*.

6 Essentially, *Cardizem* said you have to look to the
7 underlying substantive statute to determine if costs are
8 appropriate for the bond. And Mr. Miorelli's really sole point
9 is, yes, you have to do that. Well, accepting that as correct,
10 in *Cardizem* there was a Tennessee consumer statute, consumer
11 product statute, the same statute that we are relying on in
12 part in this case, which stated in part that upon finding that
13 a litigant had been frivolous or without legal or factual merit
14 a court could require an indemnification for any damages
15 incurred, including reasonable attorneys' fees and costs -- any
16 damages incurred. Therefore, the district court, at least
17 according to the Sixth Circuit, was entitled to include
18 administrative costs. The court looked to the underlying
19 statute under Erie -- those were state statutes -- and approved
20 that, a bond of some 120,000-plus dollars.

21 Under *Pedraza*, *Pedraza* essentially held that costs
22 included anticipated appellate attorneys' fees. We're not
23 asking for attorneys' fees at this point in the case, although
24 presumably under Mr. Miorelli's argument we could come back and
25 do that and ask for anticipated attorneys' fees under *Pedraza*.

1 *Pedraza* relied on the Second Circuit's opinion in
2 *Adsani*, and that was a case in which -- and the *Pedraza*
3 specifically referenced this. That was a case in which the
4 appellant had no assets in the United States, no assets; and
5 yet a bond was approved.

6 *Pedraza* looked to the underlying fee shifting
7 statute; and we have cited in our brief the *Checking Account*
8 *Overdraft* case in which Judge King looked at the underlying
9 statutes in that action, all of which we relied on in this
10 case. And Judge King found that an appellate bond was
11 appropriate in that case, an administrative bond was
12 appropriate in that case relying on the same state statutes
13 that we are relying on in our complaint.

14 The other issue that Mr. Miorelli brings up is that
15 it's his contention which has been refuted by Home Depot as
16 well and is discussed in our brief that only Home Depot, not
17 the class, is harmed by an increase in administrative costs.
18 And in so doing, Mr. Miorelli fundamentally misunderstands the
19 waterfall provisions of the settlement. If the 13 million
20 dollar fund for claims is not exhausted, then credit for the
21 cost of monitoring and then credit for class administration and
22 notice costs are allowed for -- allowed to Home Depot. But
23 after that any remaining funds are distributed pro rata to
24 settlement class members who have got documented losses or who
25 have presented documented losses.

1 So, essentially, an increase in administrative costs
2 does harm the class. And that's -- so his argument is just
3 wrong. And there's no conflict in having Home Depot do that or
4 there's no argument in -- or there's no conflict between the
5 class and Home Depot on this matter.

6 Now, as I said, we believe that upon examination it
7 will turn out that Mr. Miorelli has more than no financial
8 ability to pay a bond, to post a bond. Even if he has no
9 financial ability to post a bond, a bond is still appropriate
10 under the factors that we've discussed.

11 But from his declaration already we know that he has
12 many -- or he is well paid. He has chosen a lot of
13 discretionary spending. He has borrowed money for a BMW. He
14 has borrowed money for his education. He has borrowed money
15 for investment rental property. His Facebook page indicates
16 that at the beginning of the month he was in Santo Domingo and
17 Mexico City on vacation. It also indicates other travel.

18 If we were to look -- if we could examine him about
19 his declaration, we could find out other things. But the fact
20 of the matter is that life is all about choices. Mr. Miorelli
21 has made choices on what he spends his money on.

22 He can choose to file an appeal, but he cannot do it
23 for nothing. He can't impose his desire to file an appeal, the
24 costs of that which are extremely considerable, on hundreds of
25 thousands of members of the class, millions of members of the

1 class. It's not appropriate. It's not fair. It's not what's
2 intended by the rules of court, and it's frankly offensive that
3 he would believe that he could do that at no cost.

4 If he wants to do it, fine. But there is a cost, a
5 cost that's being imposed on our clients. And the rule says
6 that we're entitled to have him post a bond for those costs.

7 Thank you, Your Honor.

8 THE COURT: Mr. Haskins?

9 MR. HASKINS: Thank you, Your Honor. We will be very
10 brief here.

11 It's Home Depot's position that Mr. Worley and in the
12 briefs that were filed on behalf of the Plaintiffs in support
13 of their motion for an appeal bond are directly on point and
14 they cover the waterfront, if you will, Your Honor, with
15 respect to the issues that the Court needs to address to
16 determine the amount of the bond that should be addressed and
17 whether one should be assessed. The one issue that we did want
18 to respond to, Your Honor, was raised by Mr. Miorelli in his
19 response to the Plaintiffs' motion for an appeal bond here.
20 And I thought before we get to that exact point it would be
21 nice to just go back and take a look at the rule and see
22 exactly, you know, why we are here and why the Plaintiffs are
23 asking for an appeal bond.

24 The purpose of Rule 7 is to protect an appellee
25 against the risk of nonpayment by an unsuccessful appellant.

1 In other words, the purpose really is to preserve and protect
2 the rights of the appellee.

3 Now, in his response to the Plaintiffs' motion for an
4 appeal bond, Mr. Miorelli says the only conceivable beneficiary
5 of the administration cost portion of class counsel motion for
6 appeal bond is Home Depot. Now, Mr. Worley just explained that
7 under the terms of the settlement agreement that's actually not
8 true, that there is a material risk that the benefits that are
9 available to the class members with documented claims in this
10 case could be impacted by these additional costs or, more
11 specifically, Mr. Miorelli's failure to pay those costs should
12 he lose his appeal.

13 Well, what's missing from Mr. Miorelli's analysis
14 here is that Home Depot is also a proponent of the settlement
15 and, in fact, is an appellee in this case. And as a result,
16 because Home Depot is an appellee its rights as well as the
17 rights of the Plaintiff class here should be protected. Home
18 Depot should not be forced to bear the risk that Mr. Miorelli
19 loses on appeal which we think will happen, and we should not
20 be forced to bear the risk that Mr. Miorelli will not be able
21 to pay the significant additional costs associated with
22 administering the settlement in this case when and if he loses
23 that appeal.

24 So as a result, Your Honor, Home Depot has joined the
25 Plaintiffs' motion and would request that Your Honor enter an

1 appeal bond in the amount that the Plaintiffs have requested.

2 Thank you.

3 THE COURT: Mr. Miorelli?

4 MR. MIORELLI: Good afternoon, Your Honor.

5 I'd like to go back to what the legal issue is in
6 dispute which is what does Rule 7 allow to be taxed an appeal
7 bond. And I think *Pedraza* and *Young* are clear that there has
8 to be either a rule or a statute that says this is something
9 that can be taxed.

10 Now, class counsel has now come forward and said
11 a-ha, Tennessee law, that's a sticking point. Well, the
12 settlement agreement says it's governed by Georgia law. I'm a
13 resident of the state of Florida. All the activities that I
14 did that resulted in my injury in this case happened in the
15 state of Florida.

16 There's apparently no reason for this Court and
17 there's been no citation of law to this Court by the movants
18 who bear the burden here as to why the Court should apply
19 Tennessee law to the exclusion of all others and suddenly apply
20 an enormous appeal bond which I absolutely cannot pay, in
21 essence, placing a tax on me standing up for what I believe my
22 rights to be because I'm not wealthy enough to pursue that. So
23 in fairness, that's something that I don't think is fair.

24 And I don't think that my understanding of the
25 settlement agreement is wrong because the waterfall provision

1 that they talk about in the settlement agreement only happens
2 if there is a miniscule number of claims. Now, in their motion
3 for fees, class counsel claimed that there would be all this
4 money paid out. Class counsel asked the Court to calculate
5 their fee on a percentage cross-check on the assumption that
6 there wouldn't be a reversion of more than half of the 13
7 million dollars back to Home Depot. Now they claim that that's
8 likely to happen and that there's likely to be this pro rata
9 distribution.

10 Now, class counsel has access to the settlement
11 administrator. There is a couple days left of the claims
12 period. Presumably, the facts are available if the parties
13 were to go and chase them down to know whether or not this
14 reply brief allegation is accurate. If it is, Your Honor, I
15 think that raises even more questions about the attorneys' fee.

16 Now, in his motion, and remembering that he bears the
17 burden, he only proved about a hundred dollars worth of costs
18 on appeal. Essentially, the only costs an appellee bears on
19 appeal that are taxable under Rule 7 is their cost of copying
20 and their cost of transmitting their copies. And I have shown
21 how enormous my appendix is going to have to be. That's a cost
22 I understand and have to bear by filing an appeal. And I'm
23 willing to front the hundred dollars or so that they are
24 probably going to cover under Rule 7.

25 But it's really amazing to think that the parties can

1 just pick and choose what law they want to apply to this case.
2 Presumably, if they could pick Tennessee for this, they could
3 pick Florida for that, they could pick Georgia for the other
4 thing. But they didn't do that in the settlement agreement.
5 They picked Georgia. And to the extent this is applying to me,
6 I would only have been a member of the Florida class. And I
7 called that multifactor test mumbo jumbo because, in fact, I
8 think class counsel has proven my case. In their motion, they
9 say if you don't -- if the appellant does not prove that he
10 cannot pay the bon then the Court should presume that he can.

11 Now, I think that's a crazy sort of burden shifting
12 in the first place. But then in the reply brief after I filed
13 and said, Look, I can't pay this, they say, ah-ha, therefore,
14 this multifactor test now says he must pay. I mean, how is it
15 possible that this multifactor test if it is a reasonable and
16 useful judicial tool comes out with the same answer no matter
17 what facts you plug into it? That doesn't make any sense to
18 me.

19 Now, class counsel is also not correct to call my
20 appeal frivolous. And while I know that we're not supposed to,
21 we don't necessarily need to pre-argue our appeals, I think
22 it's important to point out in the face of filings against me
23 that have literally started and ended with an ad hominem attack
24 in every single filing that I actually am pursuing legitimate
25 appellate issues. And this is not to disrespect the Court's

1 order in this. However, there are open and reasonable
2 questions of law in the Eleventh Circuit which is what I intend
3 to raise on appeal.

4 Now, questions of law are reviewed de novo; and all
5 of them if the Eleventh Circuit decided in my favor would
6 result in both a better outcome for the class but also would
7 result in having to reverse this Court's judgment.

8 So one of them is my argument that under Rule
9 23(e)(3) the side deal has to be fully disclosed to the class.
10 I believe as a matter of law that if that side deal is not
11 disclosed that the settlement agreement and the notice is not
12 proper and is not adequate. That would be reviewed de novo by
13 the Eleventh Circuit. I believe the requirement that an
14 objector personally sign their objection is a violation of Rule
15 11. I think that's the case no matter what the circumstances
16 are of the objector. Again, that's a question of law that will
17 be reviewed de novo by the Eleventh Circuit.

18 I think the delegation amongst class counsel of how
19 to distribute attorneys' fees is a violation of Rule 23(h). I
20 think it's a violation of Rule 23(h) in every case. I think it
21 is unlawful under Rule 23(h) for the Court to not make the
22 decision about how fees are distributed amongst each attorney
23 or each firm. Again, that's a question of law that would be
24 reviewed de novo by the Eleventh Circuit.

25 I also plan to argue to the Eleventh Circuit that

1 they should adopt the rule adopted by the Sixth Circuit in the
2 case I cited in my brief about having to disclose full billing
3 records to the class. Again, question of law, not a question
4 of application of law to facts.

5 Now, none of these contentions are things I made up.
6 Each of them is supported by direct precedent from a different
7 circuit, but it's an issue that hasn't been addressed by the
8 Eleventh Circuit.

9 Now, admittedly, I am a much younger lawyer, Your
10 Honor, than many of the others, much less experienced. But my
11 understanding of frivolity is that it has to be something that
12 nobody thinks is reasonable. And all of these issues I just
13 outlined are things that other appellate courts have not only
14 thought were reasonable but have ordered to be the law in those
15 circuits. And I intend to ask the Eleventh Circuit to do the
16 same thing here. That's not frivolous, and that's not up
17 against a monumental standard of review. That's up against de
18 novo standard of review as a question of law.

19 Now, Your Honor, I disagree with the arguments that
20 I'm a party. I don't believe here right now I am a party. I
21 don't believe that I have ever been a party. But I think I am
22 running out of time, so I'm not going to go into that too much.
23 But, you know, the arguments about the deposition, my view on
24 it is all I have ever said to them is follow the rules. I've
25 never violated any of those courts' orders. This Court has had

1 two orders that would have applied to me. Both of them said in
2 permissive language that an objector could be discovered, could
3 be deposed. But that doesn't mean that the objectors have to
4 waive all of the protections they have under the Federal Rules
5 of Civil Procedure. I didn't do that, and now they come after
6 me like I'm a terrible person.

7 Your Honor, I'm willing to post a bond for the costs
8 that are properly taxed on appeal under Rule 7; but I'm not
9 willing or able to post a bond for things that are not
10 authorized by law and would only be authorized under a
11 multifactor test that doesn't make any sense because it
12 apparently comes out with the same answer against an objector
13 no matter how it's considered.

14 Thank you, Your Honor.

15 THE COURT: Mr. Worley, I'll give you a couple more
16 minutes if you want to say anything else in response to
17 Mr. Miorelli.

18 MR. WORLEY: I would, Your Honor.

19 Mr. Miorelli wants us to point to a statute. We did,
20 the Tennessee statute. And, frankly, I didn't understand his
21 point about Florida law, Georgia law, all of that. But in
22 *Cardizem* this is what the Eleventh -- or I'm sorry -- the Sixth
23 Circuit said in applying the Supreme Court's decision in *Marek*
24 to the meaning of costs under Federal Rule of Appellate
25 Procedure in *Sams'* case, they are required to determine what

1 sums are properly awardable under the relevant substantive
2 statute or other authority. Then there's a cite to *Marek*.
3 "The district court noted that all of the various state and
4 federal statutes asserted by the Plaintiffs during the class
5 actions could be considered in determining what sums were
6 properly awardable."

7 And, obviously, we cited to Tennessee law and other
8 state statutes on the attorneys' fees cost-shifting issue.

9 THE COURT: Well, the problem I have with that,
10 Mr. Worley, is it's frankly this. When you filed your motion,
11 you asked me to award \$1,100 in direct appeal costs -- and I'm
12 going to do that, no question about that, for reasons I'll
13 outline in a minute -- and then \$39,117 for a portion of the
14 increased administrative costs.

15 That's where I've got a problem. I've read very
16 carefully the *Pedraza* case, the 2002 Eleventh Circuit case.
17 And as I read that case, the only circumstances under which I
18 can require Mr. Miorelli to post a bond for more than the
19 actual anticipated costs is, number one, if there's a
20 fee-shifting statute. And I don't believe that there really is
21 in this case applying Georgia law to the settlement agreement.

22 The other circumstances in which I could apply more
23 than the actual costs are in the circumstances indicated in
24 chambers which was outlined by the court in *Pedraza*. That's a
25 common fund situation. That's not what we have here. As a

1 sanction for willful disobedience of a court order, we don't
2 have that here. And then I can award attorneys' fees or
3 include attorneys' fees when a party has acted in bad faith,
4 vexatiously, wantonly or for oppressive reasons. That's the
5 only one that appears to me to be in play, and that's not what
6 you relied upon in your motion. You wanted me to award a bond
7 based on increased administrative costs.

8 Now, I'm willing to entertain a motion that I should
9 order Mr. Miorelli to post a bond of more than \$1,100 because
10 he has acted in bad faith, vexatiously, wantonly or for
11 oppressive reasons. But that's not what you asked for.

12 MR. WORLEY: Your Honor, we'd be happy to go back --

13 THE COURT: Except in your reply you hinted at that.

14 MR. WORLEY: Well, we think that that -- that would
15 be appropriate under *Pedraza*. We think --

16 THE COURT: And as annoying as he may be to y'all,
17 I've got to give him his due process rights of putting him on
18 notice as to what it is y'all are asking me to do and give him
19 an opportunity to be heard, however much he annoys y'all.

20 MR. WORLEY: It's not an issue of annoyance, Your
21 Honor.

22 THE COURT: Well, that's minimizing the problem.
23 You're right. You're absolutely right. However much hardship
24 he causes to the Plaintiffs and annoys you.

25 MR. WORLEY: Thank you, Your Honor, for pointing out

1 the hardship, the genuine hardship that is being imposed on the
2 Plaintiffs. If Your Honor is saying that under *Pedraza* we can
3 bring a motion for a bond based on anticipated appellate
4 attorney fees --

5 THE COURT: That's how I read the case, Mr. Worley.

6 MR. WORLEY: -- and I certainly would read it the
7 same way, although I do think as I stated that there are other
8 avenues as well -- we're happy to do that, and we will do that.

9 THE COURT: Well, that's the way I read the case,
10 Mr. Worley. So I'm going to grant in part and deny in part the
11 consumer Plaintiffs' motion for an appeal bond. I do think
12 that the five factors are what are generally considered by
13 courts in deciding whether or not to require an appellant to
14 post an appeal bond. And with respect to the \$1,100 in direct
15 appeal costs, I think all those factors weigh in favor of me
16 ordering Mr. Miorelli to post a bond. I think he's financially
17 able to post a bond in the amount of \$1,100 based on his
18 declaration. I think the lack of merit of his appeal which I
19 think is totally lacking in merit on any issue whatsoever
20 weighs in favor of me requiring him to post a bond.

21 I think there is some evidence that he has shown bad
22 faith in his failure and resistance to submitting to a
23 deposition. Every time that he is backed into a corner and
24 made to agree to when he is going to give a deposition he finds
25 some other excuse not to do it.

1 I think his prior actions in objecting to the other
2 class-action settlements weighs in favor of imposing a bond.
3 And I think the risk of nonpayment if he doesn't have to post a
4 bond is great. Based upon his course of conduct in evading and
5 obstructing and delaying and preventing the Plaintiffs from
6 deposing him, I think a similar course of action would be
7 expected in any effort to collect on an order from me or from
8 the Eleventh Circuit ordering him to pay costs. I'm sure that
9 he would resist that to the nth degree and make it financially
10 impossible for anybody, whether the Plaintiffs or Home Depot or
11 anybody else, to make him pay the cost of an appeal. So I have
12 no hesitation whatsoever in ordering him to pay -- in ordering
13 him to post a cash bond or a corporate security bond acceptable
14 to the clerk in the amount of \$1,100 and that he do so within
15 ten days from today or his appeal should be dismissed.

16 And, Mr. Worley, if you will prepare a written order
17 to that effect and present it to me, I'll be glad to sign it.

18 MR. WORLEY: I will do so, Your Honor.

19 If that's all that you wanted to say, Your Honor, I
20 did want to raise an issue or inform the Court of an issue. We
21 have filed a motion for sanctions against Mr. Miorelli.
22 Briefing is not complete on that. We would anticipate filing a
23 short reply brief to his response, but we would not intend to
24 take up the Court's time with a hearing on that if that's the
25 Court's pleasure.

1 THE COURT: What do you say, Mr. Miorelli? Are you
2 comfortable with me ruling on the briefs, or you want a hearing
3 on it?

4 MR. MIORELLI: Your Honor, I believe that I am
5 entitled to a hearing on a penal motion such as that which is
6 what the Eleventh Circuit has called it. I think it's
7 inappropriate and not supported. But I also think that to some
8 extent the questions in that are based on my motion to quash
9 that got transferred to this court.

10 But, no, Your Honor, I would not waive my right to a
11 hearing on that.

12 THE COURT: Well, we will get back to y'all about
13 that, Mr. Worley.

14 MR. WORLEY: One other item, Your Honor.

15 Since we are going to file an additional motion for
16 another bond and Mr. Miorelli is already here, would it be
17 appropriate for us to examine him about his ability to pay?

18 The Court didn't seem to consider that a great
19 factor, but it -- or should we attempt to depose him again?

20 THE COURT: I'm here waiting on a jury verdict, so
21 I've got all afternoon. Why don't you go ahead and ask
22 Mr. Miorelli any questions you want to on that issue now,
23 Mr. Worley.

24 MR. WORLEY: All right. If he could be sworn in.

25 THE CLERK: Sir, if you will raise your right hand,

1 please.

2 (Witness placed under oath by the clerk.)

3 THE CLERK: Please have a seat, then state your name
4 for the record.

5 THE COURT: I take it Mr. Miorelli has not yet been
6 deposed; is that right?

7 MR. WORLEY: That is correct, Your Honor. He has not
8 been deposed.

9 MR. MIORELLI: And my name is Sam Miorelli for the
10 record.

11 THE COURT: What?

12 MR. MIORELLI: My name is Sam Miorelli for the
13 record.

14 - - -

15 SAM MIORELLI,
16 having been first duly sworn, was examined and testified as
17 follows:

18 DIRECT EXAMINATION

19 BY MR. WORLEY:

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13 MR. WORLEY: Your Honor, I don't have any more
14 questions for Mr. Miorelli. But given that Mr. Miorelli when
15 he stood here and made his argument stated that he was unable
16 and unwilling to post a bond, and given that we are going to be
17 posting a -- we are going to be moving the Court for a bond
18 under the requirements of *Pedraza*, we would ask that the Court
19 order Mr. Miorelli to provide us with a copy of his two most
20 recent statements from his Roth 401K.

21 THE COURT: All right. Mr. Miorelli, I will order
22 you within ten days from today's date to provide with the -- to
23 provide to the Plaintiffs' counsel your two most recent
24 quarterly statements from your Roth IRA and submit those with a
25 supplemental declaration under seal to the court.

1 MR. MIORELLI: Your Honor, if I may ask a question?

2 Is it the IRA or the 401K? They are different accounts.

3 MR. WORLEY: The -- well, all of them actually.

4 THE COURT: Both of them.

5 MR. MIORELLI: Thank you.

6 THE COURT: Any questions, Ms. Sumner?

7 MS. SUMNER: Your Honor, we don't have any questions
8 concerning his finances. We just reserve the right to the
9 extent we move forward with an additional hearing on the
10 sanctions to potentially ask questions at that point on that
11 topic.

12 THE COURT: All right. Mr. Miorelli, you want to ask
13 yourself any questions?

14 MR. MIORELLI: No, Your Honor.

15 THE COURT: All right. You can go back to your seat.

16 I think that concludes this hearing.

17 MR. WORLEY: Thank you, Your Honor.

18 THE COURT: Thank you very much. Court's in recess
19 until further order.

20 (Proceedings adjourned at 3:06 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 38, are a true and correct copy of the proceedings in the case aforesaid.

This the 26th day of October, 2016.

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court